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Norma D. Cox v. Cyril P. Thompson : Respondent's Reply to Appellant's Petition for Rehearing

Utah Supreme Court

Stewart, Cannon & Hanson; Attorneys for Respondent;

Case No. 7796

IN THE SUPREME COURT
of the
STATE OF UTAH

NORMA D. COX, Administratrix of the Estate of JACKSON BLAINE COX, Deceased,

Plaintiff and Appellant,

vs.

CYRIL P. THOMPSON,

Defendant and Respondent.

RESPONDENT'S REPLY TO APPELLANT'S PETITION FOR REHEARING

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Attorneys for Respondent

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RULE GOVERNING REHEARING

This court early laid down the rules governing when a rehearing of an appeal is justified. In *Ducheneau* v. *House,* 4 Utah 483, 11 Pac. 619 the court said:

> "The petition for rehearing states no new facts or grounds for a reversal of the judgment of the lower court. It is mainly a reargument of the case. We have repeatedly called attention to the fact that no rehearing will be granted where nothing new and important is offered for our consideration. We again say that we cannot grant a rehearing unless a strong showing therefor be made. A reargument or an argument with the

court upon the points of the decision, with no new light given, is not such a showing."

See also *Brown* v. *Pickard,* 4 Utah 292 at page 294, 11 Pac. 512 and *Cummings* v. *Nielson,* 42 Utah 157 at page 173, 129 Pac. 619.

Appellant's Petition For Rehearing is in effect a re-argument of the matter originally briefed and argued to the court. The opinion of the court covered the questions raised by appellant *in all of its phases* and we have been unable to see any basis or reason for a rehearing.

Petitioner makes two Statements of Points as follows:

> "Point 1: The court should have sustained each of the points raised in appellants brief on appeal unless it was the courts intention to modify or reverse the existing law heretofore announced by this court covering said points of law.
>
> "Point 2: The court erred in failing to construe the evidence in a light most favorable to the plaintiff."

POINT 2

THE COURT DID NOT FAIL TO CONSTRUE THE EVIDENCE CONSIDERED AS A WHOLE FAVORABLE TO THE PLAINTIFF.

As to the last mentioned point, the court by its decision was fully cognizant of the rule as is seen by the language used by the court on the first page of its opinion as follows:

> "* * * Contributory negligence becomes a question of law when from the facts reasonable men can draw but one inference and that infer-

ence points unerringly to the negligence of decedent as contributing to his death. Compton v. Ogden Union Ry. & Depot Co., supra; Lewis v. Rio Grande Western R. Co., 40 Utah 483, 123 P. 97.

"In determining whether decedent was contributorily negligent as a matter of law, the evidence, and all reasonable inferences therefrom, must be viewed in the light most favorable to plaintiff. Finlayson v. Brady, ... Utah ....., 240 P. 2d 491; Mingus v. Olsson, supra."

POINT 1

PETITIONER'S FIRST POINT IS A REARGUMENT OF THE MATTERS ORIGINALLY BRIEFED AND SUBMITTED.

The first point is based on appellant's original argument claiming that there was some conflict in the evidence and reference is again made to Mr. Ferre's testimony. While Ferre, who only saw the body in the air at an angle, marked and initialed "XF" as what he termed the point of impact (Tr. 54, R. 70) across the line dividing lanes one and two, this testimony in the light of the undisputed physical evidence left no material conflict. That the matter was fully considered by the court is evident from the following paragraph of the court's opinion appearing on page 3 as follows:

"Plaintiff argues that there is a conflict in the evidence as to the exact point of impact. She claims such a conflict if resolved in favor of decedent, would be highly probative of his non-negligent conduct. She contends that the question is a factual one which should properly have been submitted to the jury. Mr. Alma Ferre, as stated before, approximated the point of impact as being

about on the line which separates lanes one and two. ('X' on the diagram.) The testimony of others who observed the mishap placed the point of impact somewhere in lane two. The plaintiff's theory is that defendant through excitement negligently swerved into Mr. Cox as he stood in lane one waiting for defendant's car to pass. Considering that Mr. Ferre observed the mishap from the front of the cafe, that he viewed the scene over his parked automobile, that he did not see the car prior to the impact, that he glanced away from the scene for a second or two, that the street was dimly lighted, his testimony and the testimony of others do not conflict in any material degree."

In considering all phases of the case this court carefully reviewed the testimony of both interested and disinterested witnesses and all of the witnesses viewed in the light of the *undisputed physical evidence* as shown by Officer Peters and Fire Chief Howard R. Jacobsen who were standing almost directly across the street when the accident occurred (see pages 11 and 12, Respondent's original Brief). Viewing the entire evidence, the court concluded "from the facts reasonable men can draw but one inference and that inference points unerringly to the negligence of decedent as contributing to his death."

We could go on further to review all of the evidence but the same would constitute a reargument of the matters submitted in the original briefs and carefully outlined by the court in its opinion. Certainly the court in its opinion carefully reviewed the authorities cited by petitioner and many others including the Restatement of the Law of Torts. The decision is consistent with

earlier Utah cases, namely *Mingus v. Olsson,* 114 Utah 505, 201 Pac. (2d) 495; *Reid v. Owens,* 98 Utah 50, 93 Pac. (2d) 680; *Sant v. Miller,* 115 Utah 559, 206 Pac. (2d) 719.

Respectfully submitted

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